

ORIGINAL

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

THE WASHINGTON HARBOUR
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202) 424-7500

DOCKET FILE COPY ORIGINAL
FAX (202) 424-7643
WWW.SWIDLAW.COM

NEW YORK OFFICE
THE CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, NY 10174
(212) 973-0111 FAX (212) 891-9598

July 21, 2000

VIA HAND-DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
445 Twelfth Street, SW, Room TW-A325
Washington, DC 20554

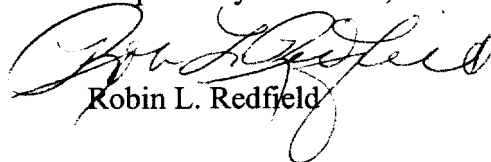
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Re: Comments of Pac-West Telecomm, Inc.
In the Matter of Inter-Carrier Compensation for ISP-Bound Traffic
CC Docket Nos. 99-68 and 96-98 – Public Notice of June 23, 1999

Dear Ms. Salas:

On behalf of Pac-West Telecomm, Inc. ("Pac-West"), enclosed for filing please find an original and five copies of Pac-West's comments in the above-referenced dockets. Please return the extra file-stamped copy to the courier.

Respectfully submitted,


Robin L. Redfield

Enclosure

cc: Chief, Competitive Pricing Division (One copy via hand-delivery)
International Transcription Services (One copy via hand-delivery)

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**

In the Matter of)	
)	
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For ISP-Bound Traffic)	
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Implementation of the Local Competition)	CC Docket No. 96-98
Provisions in the Telecommunications Act)	
of 1996		

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**COMMENTS OF PAC-WEST TELECOMM, INC ON THE
REMAND OF THE COMMISSION'S RECIPROCAL COMPENSATION
ISP RULING BY THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT**

Patrick Donovan
Robin L. Redfield
SWIDLER BERLIN SHEREFF
FRIEDMAN, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007
Tel: (202) 424-7500
Fax: (202) 424-7645

Dated July 21, 2000

Counsel for Pac-West Telecomm, Inc.

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Pac-West Telecomm, Inc. ("PacWest"), by undersigned counsel, hereby submits its comments in response to the Commission's Public Notice of June 23, 1999.¹ The Commission seeks comments on the jurisdictional nature of Internet service provider ("ISP") bound traffic, as well as the scope of the reciprocal compensation requirement of §251(b)(5), and the relevance of the concepts of "termination," "telephone exchange service," "exchange access service," and "information access."

I. INTRODUCTION

As the Commission is well aware, the issue of reciprocal compensation for ISP traffic has created a deluge of lawsuits that have not been quelled by the Commission's *ISP Ruling*.² Local exchange carriers ("LECs") have continued to require direction from multiple state commissions and federal district courts as to whether ISP-bound traffic is

¹ *Comment Sought On Remand of The Commission's Reciprocal Compensation Declaratory Ruling By the U.S. Court of Appeals for the D.C. Circuit*, CC Docket Nos. 96-98, 99-68, Public Notice (rel. June 23, 1999).

² *Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, 14 F.C.C. Rcd. 3689 (1999) ("*ISP Ruling*").

subject to reciprocal compensation. The recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Bell Atlantic*, that vacated and remanded the *ISP Ruling*, has provided the Commission with an opportunity to put many of these issues to rest.³

The *Bell Atlantic* decision leaves undisturbed the Commission's use of the "end-to-end" analysis as a basis to conclude that ISP-bound traffic is *jurisdictionally* interstate. But, the nature of ISP-bound traffic, and statutory and regulatory authority, make clear that for *regulatory* purposes, "dial-up" ISP-bound traffic between two telephone numbers in the same calling area should be treated as local traffic and subject to reciprocal compensation. To summarize, ISP traffic is composed of two, not one component -- a telecommunications component and an information services component. The telecommunications component originates and terminates within a local calling area. Termination occurs at the point at which a call from the originating LEC reaches the "called party" or the ISP. Under this analysis alone, an ISP bound call can be characterized as local for purposes of reciprocal compensation, and, therefore, comes within the purview of the Commission's definition and 47 U.S.C. §251 (b)(5) of the 1996 Act.⁴ Moreover, there are other factors that indicate that ISP-bound traffic should be subject to reciprocal compensation, including the fact that an ISP-bound call is more like a call in which two LECs collaborate to complete a call, then one in which a LEC collaborates with a long-distance carrier to complete a call. Further, as the Commission noted, there are only two classes of services, "telephone exchange" and "telephone

³ *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) ("*Bell Atlantic*")

access.”⁵ Service to ISPs fall within the telephone exchange category. ISPs may use telecommunications in providing their services, but they are not telecommunications service providers.

Not only is the conclusion that ISP traffic is subject to reciprocal compensation consistent with the 1996 Act and applicable regulations, but it is the right result. As the many commissions and other authorities have noted, LECs incur costs when terminating traffic bound for ISPs for which compensation is due. If not compensated as local traffic, the terminating carrier would not receive any compensation. Accordingly, the Commission should reaffirm that its jurisdiction extends to ISP traffic, and that the telecommunications component of dial-up ISP-bound traffic is subject to reciprocal compensation treatment as local traffic under §251(b)(5) of the Act.

As detailed in these Comments, this finding is consistent with the Commission’s historical classification of ISP traffic as containing both a telecommunications and information component. Further, it is consistent with the goals and objectives of the 1996 Act to foster competition in the local telecommunications market, and it is an equitable result.

⁴ See The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, (codified as amended in scattered sections of 15 and 47 U.S.C.) (the “1996 Act”).

⁵ See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, et al., 15 FCC Rcd 385, 406-407 ¶46 (1999) (“*Advanced Service Remand Order*”).

II. DISCUSSION

A. THE COMMISSION'S DETERMINATION THAT ISP-BOUND TRAFFIC IS JURISDICTIONALLY INTERSTATE REMAINS UNDISTURBED

In this Commission's *ISP Ruling*, it addressed the jurisdictional nature of ISP-bound traffic, noting that it "traditionally has determined the jurisdictional nature of communications by the end points of the communication," rejecting "attempts to divide the communications at intermediate points of switching or exchanges between carriers."⁶ This Commission followed its long-standing precedent in which it previously determined that where "there is a continuous path of communications across state lines between the caller and [for instance] the voice mail service[,]'" the call is interstate for jurisdictional purposes.⁷ The Commission also noted that it and the courts have considered the end-to-end nature of the communications more significant than the facilities used to complete the communications.⁸ This finding and longstanding precedent was not altered by the *Bell Atlantic* decision. The Court made clear in *Bell Atlantic* that it was not taking issue with the use of the end-to-end analysis to conclude that ISP-bound traffic is jurisdictionally interstate. The Court noted, "[t]he Commission has historically been justified in relying on this method [the end-to-end analysis] when determining whether a particular communication is jurisdictionally interstate."⁹ But, as the Court also noted, "[e]ven if the difference between ISPs and traditional long-distance carriers is irrelevant

⁶ See *ISP Ruling* at 3695 ¶10.

⁷ *Id.* at 3696 ¶10, citing *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation*, 7 F.C.C. Rcd 1619 (1992).

⁸ See *id.* at 3696 ¶11.

⁹ See *Bell Atlantic* at 5.

for jurisdictional purposes, it appears relevant for purposes of reciprocal compensation.”¹⁰ Thus, the *Bell Atlantic* Court vacated and remanded the *ISP Ruling*, not because it found fault with the Commission’s jurisdictional determination, but because, among other concerns, it took issue with the Commission’s failure to explain how its “end-to-end” jurisdictional analysis was applicable to determine whether reciprocal compensation was owed for ISP-bound traffic. Because the Commission’s analysis, on which it based its conclusion that ISP bound traffic is not local under §251(b)(5), conflicts with prior FCC precedent and the Commission’s own regulations, the Court was unable to reconcile these authorities with the conclusions the Commission reached. In the Court’s assessment, there is a clear difference between the analysis the Commission conducts to determine jurisdiction, and the analysis the Commission conducts to determine regulatory treatment under the 1996 Act:

The Commission’s ruling rests solely on its decision to employ an end-to-end analysis for purposes of determining whether ISP-traffic is local. There is no dispute that the Commission has historically been justified in relying on this method when determining whether a particular communication is jurisdictionally interstate. But it has yet to provide an explanation why this inquiry is relevant to discerning whether a call to an ISP should fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs.¹¹

Thus, it is clear that the Court does not dispute the Commission’s assertion of jurisdiction over ISP services. Nor did the Court challenge the Commission’s application

¹⁰ See *id.* at 6-7.

¹¹ *Bell Atlantic* at 5.

of its “end-to-end” analysis of dial-up traffic to ISPs for the purposes of determining jurisdiction. The Court, however, recognized a distinction between the use of the end-to-end analysis to determine jurisdiction and the eligibility of ISP-bound traffic for reciprocal compensation for regulatory purposes. In fact, the Court characterized the application of the end-to-end analysis for this purpose of determining the regulatory nature of ISP-bound traffic as “yield[ing] intuitively backward results.”¹² Further, the Court found that “arguments supporting use of the end-to-end analysis in the jurisdictional analysis are not obviously transferable to this context.”¹³

This distinction between jurisdictional and regulatory treatment is consistent with the Commission’s historical treatment of communications. In instituting the enhanced service provider (“ESP”) exemption, the Commission has long recognized that it may assert jurisdiction over interstate information (or enhanced) services, while ordering local regulatory treatment of component parts. By ordering LECs to make local exchange services available to ISPs, in order for them to provide interstate information services, the Commission created a dichotomy between jurisdiction and regulation. It is for this reason that the Commission stated in the *ISP Ruling* that “our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.”¹⁴ Thus, as will be discussed in more detail below, the Court has done more than question the Commission’s use of the end-to-end analysis, it has identified each of

¹² See *id.* at 6.

¹³ See *id.*

¹⁴ See *ISP Ruling* at 3705 ¶ 25

the legal and factual bases on which the Commission should conclude that ISP bound traffic is local traffic subject to reciprocal compensation treatment.

B. THE COMMISSION IS NOT CONSTRAINED BY THE “END-TO-END ANALYSIS” AND THE FACTS AND THE LAW MILITATE IN FAVOR OF TREATING ISP-BOUND TRAFFIC AS LOCAL TRAFFIC SUBJECT TO RECIPROCAL COMPENSATION

The Court seemed to be asking a rhetorical question when it asked whether the end-to-end analysis is relevant to a decision whether a call to an ISP is local traffic. The obvious answer -- considering the nature and characteristics of the traffic, obligations imposed by the 1996 Act, and the Commission’s regulations -- is that the end-to-end analysis is not relevant. The *Bell Atlantic* Court made this clear when it identified all the bases on which the Commission should conclude that ISP calls could be classified as local.

1. From A Regulatory Perspective, ISP-Bound Traffic Is Really Two Separate Components And Not A Continuous Uninterrupted Single Call

In analyzing an ISP-bound call from a regulatory perspective, the local dial-up telecommunications of an Internet communication is clearly severable from the information service provided by the ISP; there really are two components involved. Under §230 (f)(1) of the Act, the Internet is defined as the “international network of both Federal and non-Federal interoperable packet switched data networks.”¹⁵ In addition, under the 1996 Act, there is a distinction made between “telecommunications service” and “information service.” “Telecommunications” is defined as “the transmission, between or among points specified by the user, of information of the users’ choosing,

¹⁵ 47 U.S.C. A. §230 (f)(1) (West Supp. 2000).

without change in the form or content of the information as sent and received.”¹⁶ While, “information service” is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications”¹⁷ As recently explained in testimony submitted to the California Public Utilities Commission, the information component of the traffic is unique and distinct from the telecommunications component:

Because the Internet is a packet-switched service, many separate “end-to-end” paths can be active at the same time over a single dial-in call. A user who connects to a commercial web site may, for instance be receiving data from that web site and simultaneously receive data from a third-party ad server elsewhere on the Internet. And most of the time he may be receiving no data from anywhere. . . . The RAS [Remote Access Server] aggregates traffic from a large number of calling modems and forwards it along to whatever its destination may be, which could be in the same room or, via multiple other ISPs, around the world.¹⁸

So in essence, calls to ISPs have two separate components. There is a local telecommunications service component provided by local exchange carriers that establishes a circuit-switched connection between an ISP subscriber and an ISP. There is also an information service component provided by the ISP that permits the ISP subscriber to obtain information from the global network of interconnected computers known as the Internet. “Unlike the conventional ‘circuit-switched network,’ which uses a single end-to-end path for each transmission, the internet is a ‘distributed packet-

¹⁶ See *id.* at §153(43).

¹⁷ *Id.* at §153(20).

¹⁸ See Testimony of Fred Goldstein On Behalf of Pac-West Telecomm, Inc. at *13 (Attachment A).

switched network, which means that information is split up into small chunks or ‘packets’ that are individually routed through the most efficient path to their destination.”¹⁹

The classification of ISP traffic as containing two separate components is consistent with prior Commission precedent. In 1980 in the *Second Computer Inquiry*, “enhanced services,” of which ISPs are a subset, were defined as *end users of basic services* exempt from regulation under Title II of the Communications Act.²⁰ The distinction that was made at the time between “enhanced services” and “basic services” has continued, and was codified in the 1996 Act.²¹ While enhanced service providers may use basic services in the provision of their services, the actual enhanced services are distinct and separate, and the enhanced service providers are not providing telecommunication services. Further, calls to ISPs clearly are not viewed in the 1997 *Access Charge Reform Order* as components of a long distance call. This Commission stated in that Order:

[G]iven the evolution in ISP technologies and markets since we first established access charges in the early 1980s, it is not clear that ISPs use the public switched network in a manner analogous to IXCs. Commercial Internet access, for example, did not even exist when access charges were established. As commenters point out, many of the characteristics of ISP

¹⁹ *Bell Atlantic* at 4, citing *Matter of Federal-State Joint Board on Universal Service*, 13 F.C.C. Rcd. 11501, 11532 ¶64 (1998).

²⁰ See *Amendment of Section 64.702 of the Commission’s Rules and Regulations*, Docket No. 20828, 77 FCC 2d 384 (1980) *aff’d sub. nom.*, *Computer & Communications Indus. Assn. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (“*Second Computer Inquiry*”).

²¹ Enhanced services are now a subset of the broader category of “information services” defined at 47 U.S.C.A. §153(20). Basic services are essentially the same as “telecommunications” defined at 47 U.S.C.A. §153(43). See also *Implementation of the Non-Accounting Safeguards Order of Sections 271 and 272 of the Communications Act of 1934*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149, 11 F.C.C. Rcd 21905, at 2154-2156 ¶¶99-103 (1996) (“*Non-Accounting Safeguards Order*”) (discussing the evolution of terminology from the *Second Computer Inquiry* to the 1996 Act).

traffic (such as large numbers of incoming calls to Internet service providers) may be shared by other classes of business customers.²²

Further, the Commission noted in the *Access Charge Reform Order* that ISP subscribers reach their ISPs “through a local call” “even for calls that appear to traverse state boundaries.”²³ This Commission’s *Universal Service Order* also affirms the two component nature of the call. As the Commission stated:

When a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, *that connection is a telecommunications service and is distinguishable from the Internet service provider’s service offering.*²⁴

We agree with the Joint Board’s determination that Internet access consists of more than one component. Specifically, we recognize that Internet access includes a network transmission component, which is the connection over a LEC network from a subscriber to an Internet service provider, in addition to the underlying information service.²⁵

Thus, under the *Universal Service Order*, while all providers of *interstate telecommunications services* must contribute to the Universal Service Fund, the Commission explicitly excludes ISPs from the obligation, since they do not provide a telecommunications service.²⁶ In the Commission’s *Non-Accounting Safeguards Order*, it also determined that the local call placed to an ISP was separate from the subsequent

²² See *Access Charge Reform Order*, First Report and Order, CC Docket No. 96-262, 12 F.C.C. Rcd. 15982, 16133 ¶345 (1997).

²³ See *id.* at 16132 ¶342, and n. 502.

²⁴ *Matter of Federal State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 F.C.C. Rcd. 8776, 9180 ¶789 (1997) (“*Universal Service Order*”).

²⁵ *Id.* at 8822 ¶83.

information service provided. The severability of these components was key to the FCC's conclusion that if each component was provided, purchased, or priced separately, the combined transmissions did not constitute a single interLATA transmission.²⁷ Therefore, *as a regulatory matter*, the local telecommunications between a subscriber and an ISP are distinct from the information service provided by the ISP.²⁸

2. As the Bell Atlantic Court Noted, The First of The Two Components Does Terminate at the ISP

The termination point of an ISP call is another indicia that provides support for the conclusion that, from a regulatory perspective, ISP traffic should be considered local traffic. Because of the unique nature of ISP traffic, ISP traffic can be viewed as having multiple termination points -- a point of termination for telecommunications service and points of termination for the information services. For purposes of a jurisdictional analysis, "termination" of an information service has what can be characterized as a "theoretical endpoint." This termination point is determined by utilizing the Commission's end-to-end analysis as discussed above.

At the same time, "termination" in the context of providing a telecommunications service under the Act and from a regulatory perspective has a different meaning. The *Bell Atlantic* Court acknowledged this when it states that "the mere fact that the ISP originates further telecommunications does not imply that the original telecommunications does not 'terminate' at the ISP. However, sound the end-to-end

²⁶ *Id.* at 9179 ¶787-788.

²⁷ See *Non-Accounting Safeguards Order* at 21964 ¶120.

²⁸ See also, *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1277 (11th Cir. 2000) (noting that the Internet is not a telecommunications service).

analysis may be for jurisdictional purposes, the Commission has not explained why viewing these linked telecommunications as continuous works for purposes of reciprocal compensation.”²⁹ As noted by the *Bell Atlantic* Court, the “termination” point from a regulatory perspective can be determined by resort to the definitions provided by the Commission in its orders and regulations.³⁰ Under 47 C.F.R. §51.701(b)(1), “telecommunications traffic” is local if it “originates and terminates within a local service area.” “Termination,” in turn, is defined by the Commission in the *Local Competition Order* as “the switching of traffic that is subject to section 251(b)(5) at the terminating carrier’s end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party’s premises.”³¹ Based on these definitions, the Bell Atlantic Court found:

*Calls to ISPs appear to fit this definition: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the “called party.”*³²

In the context of delivery of traffic by a LECs to ISPs, telecommunications terminate at the ISP. The terminating LEC provides the final switching and delivery to the called party, the ISP. A typical domestic circuit-switched IXC is different from an ISP-bound call with respect to termination. A circuit-switched call using an IXC’s network does not terminate at the IXC, but rather continues (as instructed by the

²⁹ See *Bell Atlantic* at 7.

³⁰ See *id.* at 6.

³¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C. Rcd. 15499, 16015 ¶1040, *modified on recon.*, 11 FCC Rcd. 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev’d in part, aff’d in part sub nom., AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999)(“*Local Competition Order*”).

³² *Bell Atlantic* at 6 (emphasis added).

telephone number dialed by the calling customer) to the called party. The difference between the typical IXC call and an ISP bound call is that,

the IXC simply provides a 64000 bit per second symmetric bidirectional path between the two networks, effectively creating a 64000 bit per second path between the subscribers". . . . [And,] "*all of the LEC's 'access' bandwidth is dedicated to that call for its duration. ISP-bound calls are very different. They terminate at the modem bank RAS [Remote Access Server] of the Internet Access Service Provider (IASP). When a telephone call arrives at the IASP's RAS, the Internet connection is not made immediately. First the modems must "train" with each other to establish what speed the connection is capable of. This can take as long as a minute. The user must then initiate a line with the RAS using PPP [Point-to-Point Protocols] and use of one of PPP's authentication options to validate its connection with one or another IVSP [Vertical ISP]. For instance, the user's computer might attempt to log in as foonly@foo.net and give a password. The RAS performs an authentication exchange, typically using the RADIUS protocol, with the appropriate ISP's RADIUS server (in this case foonly.net's). Only after the username and password combination are validated, and the PPP exchange assigns the caller an IP address, does the caller acquire connectivity to the Internet. Of course the local call has supervised and, if on measured service, begun charging even before the modem-training sequence has begun.*"³³ (emphasis added).

Thus an ISP call does not have the same end-to-end characteristic of a typical long distance call. When ISP receives a call, the call is answered and answer supervision is returned. Answer supervision is "the term telephone companies use to describe the signal which the called station (or other customer premises equipment (CPE)) emits to tell telephone companies' billing equipment that a call has been answered and billing should commence."³⁴ The term "answered" encompasses analog telephones, modems,

³³Testimony of Fred Goldstein on Behalf of Pac-West Telecomm, Inc. at **12-13 (Attachment A).

³⁴ *Petition for Adoption of a New Section 68.314(h) of the Commission's Rules*, Report and Order, CC Docket No. 89-114, 5 F.C.C. Rcd. 6202, 6210, n.2 (1990).

facsimile devices and any other Part 68 registered terminal equipment.³⁵ Answer supervision is widely recognized in the industry as clear indicia that a call has been terminated. The answering of an ISP call has been described as follows:

The telephone circuit literally *terminates* at the ISP's Remote Access Server (RAS), a device which combines the modem bank and router functions with a bulk digital interface such as ISDN Primary Rate. The RAS answers the call, using the same signaling techniques as, for instance, PBX trunk interfaces. It then connects the call to an internal modem. When there is actual data being sent by the originating computer -- an actual IP packet, typically encapsulated within the Point-to-Point Protocol (PPP) -- then the RAS takes this data and multiplexes it onto a data circuit that eventually leads to the ISP's data center.³⁶

Even according to Bell Atlantic, "the most important quality characteristic for call terminations is answer supervision[.]"³⁷ Thus, the local call to the ISP terminates for purposes of reciprocal compensation when the call is answered and answer supervision is returned. The fact that a call "terminates" at the ISP, is significant, of course, because under §251(b)(5) reciprocal compensation is to be established by carriers for the "transport and *termination* of telecommunications." (emphasis added).

In sum, termination for jurisdictional purposes is not equivalent to termination for purposes of §251(b)(5). Termination for jurisdictional purposes is used to make a purely legal determination of federal versus state authority. In contrast, termination under §251(b)(5) is defined by a range of operational and practical concerns incident to the real world exchange of traffic between competing LECs. For all the reasons explained above,

³⁵ *Id.* at 6204 ¶18.

³⁶ See Testimony of Fred Goldstein On Behalf of Pac-West Telecomm, Inc. at *2-3 (Attachment A).

³⁷ *Amendment of Part 69 of the Commission's Rules and Regulations, Access Charges, to Conform it with Part 36, Jurisdictional Separations Procedures*, FCC 87-XXX, 2 F.C.C. Rcd. 6447, 6456 ¶82 (1987).

including the Commission's historical treatment of dial-up calls to ISPs as local pursuant to the ESP exemption, these calls are local for all practical purposes. This is an operational and marketplace reality notwithstanding that they can also be jurisdictionally interstate and notwithstanding, if the Commission so concludes, that some component of telecommunications continues to the ultimate destination. On this basis, the Commission can determine that dial-up calls to ISPs terminate locally for purposes of §251(b)(5).

3. ISP Traffic is Subject to Reciprocal Compensation Treatment under Section 251(b)(5)

Under the plain meaning of §251(b)(5) of the 1996 Act, every local exchange carrier has "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." There is no limitation within that language that excludes all traffic other than "local traffic," from reciprocal compensation obligations. The Commission concluded in the *ISP Ruling*, based on its end-to-end analysis, that ISP-bound traffic does not come within the ambit of §251(b)(5) because such traffic does not terminate at the ISP's local server.³⁸ This is no longer a valid conclusion, since as the *Bell Atlantic* Court noted, ISP bound calls do terminate when they reach the ISP (the called party) based on the Commission's own definition of "termination."³⁹

Moreover, the Commission's limitation of §251(b)(5) reciprocal compensation to local traffic is not a statutory limitation, but is one self-imposed by the Commission. As the *Bell Atlantic* Court stated, "[b]y regulation the Commission has limited the scope of

³⁸ *ISP Ruling* at 3706 ¶26, n.87.

³⁹ See *Bell Atlantic* at 6.

the reciprocal compensation requirement to ‘local telecommunications traffic.’⁴⁰ The Commission limited reciprocal compensation to local traffic because local exchange carriers were compensated for non-local traffic through access charges paid by interexchange carriers under a regime that was created prior to the Act.⁴¹ This of course does not apply to ISPs who are not carriers and are specifically exempted from access charges. Thus, there is no statutory impediment to treating calls to ISPs, even if they were not local (which they are), as entitled to compensation under §251(b)(5).

4. ISP Bound Traffic is Telephone Exchange Service Subject to Reciprocal Compensation

As further grounds for vacating the decision, the *Bell Atlantic* Court noted that the Commission has limited telecommunications traffic under the 1996 Act to two categories, “exchange access,” and “exchange service.” However, the Commission failed to provide an adequate explanation of why ISP traffic is “exchange access” rather than “exchange service.” Indeed, the *Bell Atlantic* Court seemed persuaded that calls to ISPs do not fit within the statutory definition of “exchange access” because ISPs do not connect to the network for the purpose of originating or terminating telephone toll services, but for the purpose of providing information services.⁴²

This conclusion is not altered by the Commission’s *Advanced Services Remand Order* where the Commission overruled an earlier decision that ISPs are not users of exchange access.⁴³ In the *Advance Services Remand Order*, in classifying xDSL-based

⁴⁰ *Id.* at 2.

⁴¹ See *Local Competition Order* at 16012-16014 ¶¶1033-1035.

⁴² See *Bell Atlantic* at 8-9.

⁴³ See *Advanced Services Remand Order* at 405 ¶43 (1999).

advanced services, this Commission reemphasized its previous holding that “information access” is not a third category of services, and that there are only two categories of service -- telephone exchange service or exchange access services.⁴⁴ The Commission found xDSL-based advanced services to be properly classified as exchange service when the services both originate and terminate within an exchange and exchange access when subscribers have the ability to communicate across exchange boundaries.⁴⁵ As in the *Declaratory Ruling*, the Commission relied on the end-to-end analysis to determine when xDSL-based advanced services cross exchange boundaries and are therefore access services.⁴⁶ The Commission also overruled a previous holding, and found that ISPs -- even though they are not carriers -- can be purchasers of exchange access.⁴⁷ But, the *Bell Atlantic* Court’s decision now makes clear that the Commission may no longer adhere to these conclusions for the purpose of determining whether ISP-bound traffic is subject to reciprocal compensation under the 1996 Act.

First, the *Bell Atlantic* Court rejected the application of the end-to-end analysis to determine whether ISP-bound traffic fits within the reciprocal compensation obligations of §251(b)(5). Because the end-to-end analysis is also the foundation of the Commission’s conclusion that ISP-bound traffic is exchange access, that conclusion is also now invalid. Second, as the *Bell Atlantic* Court noted, the Commission’s conclusion that ISP bound traffic is exchange access conflicts with the statutory definition of the

⁴⁴ See *id.* at 406-407, ¶46.

⁴⁵ See *id.* at 386, ¶3.

⁴⁶ See *id.* at 391-392, ¶¶15-16.

⁴⁷ See *id.* at 405 ¶43.

term. Under the 1996 Act, “[a] call is ‘exchange access’ if offered “for the purpose of the origination or termination of telephone toll services.”⁴⁸ As the Court noted, ISP-bound traffic does not meet this definition because, ““ISPs connect to the local network ‘for the purpose of’ providing information services, not originating or terminating telephone toll services.”⁴⁹ Further, the *Advanced Services Remand Order*, just like the *Declaratory Ruling*, does not satisfactorily explain “why an ISP is not, *for purposes of reciprocal compensation*, ‘simply a communications intensive business end user selling a product to other consumers and business end users.’”⁵⁰ Moreover, as discussed above, the determination that ISP-bound traffic is exchange access is inconsistent with the Commission’s own definition of where a call terminates.

Furthermore, the service provided to ISPs cannot be “information access.” The Commission has already ruled that “information access” is not a separate category apart from telephone exchange service or exchange access.⁵¹ Indeed, the Commission has suggested that information access is only a subcategory of telephone exchange service or exchange access.⁵² As discussed above, local telecommunications provided to ISPs cannot be exchange access under the 1996 Act. Thus, to the extent the classification survived the 1996 Act, information access must be a subcategory of telephone exchange service.

⁴⁸ *Bell Atlantic* at 9, citing 47 U.S.C. §153(16).

⁴⁹ *See id.*

⁵⁰ *Id.* at 7.

⁵¹ *Advanced Services Remand Order* at 406-407 ¶¶46-48.

⁵² *Id.* at 407, n.99.

Given that local telecommunications to ISPs is neither exchange access or information access, it must be telephone exchange service under the 1996 Act. As discussed above, for regulatory purposes, the local call to the ISP terminates at the called number of the ISP when answer supervision is returned. The local call to the ISP is billed to the end user as any other local call. Local service is purchased from LECs out of local exchange service tariffs. Expenses and revenues associated with service to ISPs are treated as intrastate for separations purposes.⁵³ In short, local traffic to ISPs is no different from any other local call to any other business end user. Thus, the local call to the ISP easily satisfies the definition of telephone exchange service.

C. EVEN IF THE COMMISSION CONCLUDES THAT ISP-BOUND CALLS ARE NOT LOCAL, THE COMMISSION SHOULD STILL CONCLUDE THAT COMPENSATION IS DUE

As previously explained, above, even if the Commission determines that ISP-bound traffic is not local traffic, the Commission may still find that compensation is due under §251(b)(5) because §251(b)(5) does not exclude non-local traffic from reciprocal compensation. Moreover, LECs originating and terminating ISP-bound traffic fit the definition set forth in the Commission's *Local Competition Order* of two LECs collaborating to complete a call, rather than a LEC collaborating with a long distance carrier to complete a call.⁵⁴ Under this scenario, the originating LEC obtains payment from the end-user for originating the call, but if not compensated through reciprocal compensation, the terminating carrier will receive no compensation. This is the case, even though it is undisputed that the terminating LEC incurs a cost that the originating

⁵³ See *Declaratory Ruling* at 3691-3692 ¶¶4-5

⁵⁴ See *Local Competition Order* at 16013 ¶1034.

carrier avoids. Thus, if the terminating LEC is not compensated by the originating LEC, the originating LEC receives a windfall.

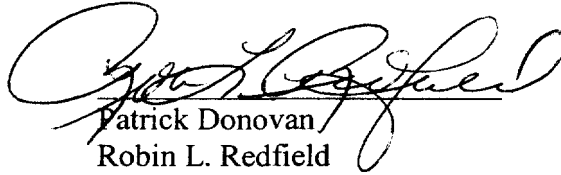
There are other untenable consequences that would result from failing to compensate LECs for terminating ISP bound calls. If CLECs are forced to carrying calls from ILECs, for which they will not be compensated, this will eventually drive CLECs away from providing services to ISPs. First, since the terminating carrier would be providing a significant subsidy at its expense, the originating LEC would have an incentive to send as much traffic to the originating LEC as possible. This will discourage the terminating carrier from continuing to provide service to the ISP. Second, the ISP, of course, will continue to be in business and will seek to obtain services from the alternative provider, ILECs, when the CLEC is unable to provide service to ISPs on a competitive basis. Thus, by failing to compensate CLECs, ILECs will be unjustly rewarded in an anti-competitive manner and ISPs will be deprived of the benefits of competition that they are presently obtaining.

III. CONCLUSION

For the foregoing reasons, the Commission should rule that ISP-bound traffic is subject to reciprocal compensation under §251(b)(5), either as local traffic or because §251(b)(5) may be applied to non-local traffic. The Commission should reaffirm that ISP-bound traffic is subject to the Commission's interstate jurisdiction. The Commission should also find that local telecommunications to ISPs terminate at the ISP because the ISP is the "called party" to whom the LEC terminates the ISP-bound traffic, and that ISP-bound traffic fits the definition of exchange service. Finally, the Commission should conclude that, even aside from the classification of ISP-bound traffic as local traffic,

compensation to terminating carriers is warranted because of the costs incurred in terminating the call.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robin L. Redfield", is written over a horizontal line.

Patrick Donovan
Robin L. Redfield
SWIDLER BERLIN SHEREFF
FRIEDMAN, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007
Tel: (202) 424-7500
Fax: (202) 424-7645

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Counsel for Pac-West Telecomm, Inc.

